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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,

Petitioner,

v.

DENNIS CLINE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals erred in holding, contrary to decisions of the First and Seventh Circuits, that the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, prohibits "reverse discrimination," *i.e.*, employer actions, practices, or policies that treat older workers more favorably than younger workers who are at least 40 years old.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following individuals were plaintiffs-appellants in the court below and are respondents in this Court: John Alge, David Bayes, Gary Bish, Dan Brenamen, Lewis Browning, Anthony Ciminillo, Scott Danner, Hixey Deeble, Robert Dewald, Larry Dicke, Richard Dirmeyer, David Driggs, Ron Duran, Kenneth Emahiser, Donald Eversole, Earl Fast, Dennis Ferguson, Robert Feucht, William Fisher, Steven Flake, Vada Flinders, Robert Frye, Gregory Gebolys, Joseph Gibson, Robert Greenlee, Raymond Gourash, Steven Hammond, Nathan Heckathorn, David Hollon, Charles Huff, Gary Huff, Richard Huffman, Anthony King, Les Krotzer, Robert Kuhn, Gerald Lanning, David Laurence, William Legrant, Charles Lowery, Donald Mathias, Gregory Mayberry, Steven Mays, John McClellan, Danny McEowen, Stan Miller, James Munson, Vincent Napier, Robert Nye, Clayton Pitts, Dennis Powers, Eliseo Ramierz, John Rammel, James Reese, Leonard Risner, Patrick Roddy, Tom Saylor, John Schlosser, David Seibert, Marvin Shepherd, M.J. Shields, Doug Sipe, David Spires, Larry Stark, Kenny Stevens, Michael Strahm, Anthony Stubbs, Russ Theil, Thomas Tucker, Charles Wagner, Harley Wagner, John Wagner, Gregory Walters, Robert Waltermyer, Charles Wood, Michael Woodruff, Allan Young, Kyle Young, Rick Young, Robert Baker, Dean Becker, Gary Salyer, Daryl Beaupre, Terry Gibbs, Jon Cottrell, Terry Biddle, John Birkmeier, Margaret Boyd, Guy Burrows, Russell Clewley, Thomas Clifton, Daniel Cline, Jed Couts, James Culp, Sandra Daniel, Michael Deal, Dana DeCamp, Richard Diltz, Steven Freed, Daniel Geething, Patrick Goddard, Frank Guerrero, Alan Haunhurst, Robert Horning, Scott Hesse, Michael Hunsicker, Loren Hurless, Joanna Jacobs, Bobby Jordan, Bob Keiffer, Richard Kessler, Paul Kesner, Douglas Kraepel, Gary Lamberjack, David Luchini, Lester Lyons, Joella Marks, Jeffrey Martin, Kenneth

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RULE 29.6 STATEMENT

Petitioner is a subsidiary of General Dynamics Corporation, a publicly traded company. No corporation owns more than 10 percent of the stock of General Dynamics Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner General Dynamics Land Systems, Inc. ("General Dynamics"), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 296 F.3d 466 (6th Cir. 2002). The opinion and order of the United States District Court for the Northern District of Ohio granting petitioner's motion to dismiss (App., *infra*, 21a-25a) is reported at 98 F. Supp. 2d 846 (N.D. Ohio 2000).

JURISDICTION

The district court had federal question jurisdiction over the plaintiffs' claims under the Age Discrimination in Employment Act of 1967 ("ADEA" or "the Act") pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on July 22, 2002. General Dynamics filed a timely petition for rehearing, which the court of appeals denied on September 19, 2002. App., *infra*, 26a-27a. On December 6, 2002, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including January 17, 2003. *See* Application No. 02A468. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The ADEA's statement of findings and purpose, § 2 of the Act, provides in pertinent part:

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave . . . .

* * *

(b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621.

The ADEA's nondiscrimination provision, § 4(a) of the Act, provides in pertinent part:

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .

29 U.S.C. § 623(a).

The ADEA's age limitation, § 12(a) of the Act, provides:

The prohibitions in this Act shall be limited to individuals who are at least 40 years of age.

29 U.S.C. § 631(a).

STATEMENT OF THE CASE

Congress adopted the ADEA in order to protect "older workers" against arbitrary discrimination arising out of invalid stereotypes about the presumed impact of aging on workplace performance. ADEA § 2(a)(1)-(3), 29 U.S.C. § 621(a)(1)-(3). The Act was intended to combat the discriminatory effect of such stereotypical views, which Congress deemed responsible for the fact that unemployment was, "*relative to the younger ages*, high among *older workers*." *Id.* § 2(a)(3), 29 U.S.C. § 621(a)(3) (emphases added).

In the decision below, a divided Sixth Circuit panel departed from this settled understanding of the ADEA and held, contrary to decisions of two other courts of appeals, that the ADEA forbids employers to treat older employees *more* favorably than their younger co-workers. The court of appeals' divergence from the text and purpose of the ADEA exacerbates a conflict among the federal courts and is inconsistent with this Court's decisions. Moreover, the decision below will impose serious and unwarranted new burdens, both on the older workers whose opportunities the Act was intended to secure and on the employers who seek to extend those opportunities without subjecting themselves to vexatious litigation. Review by this Court is necessary to avert these negative consequences of the Sixth Circuit's erroneous interpretation of the ADEA.

I. Factual Background

General Dynamics operates manufacturing plants at Lima, Ohio, and Scranton, Pennsylvania, at which the em-

ployees are represented by the United Auto Workers ("UAW"). This litigation arises from two collective bargaining agreements negotiated between General Dynamics and UAW. The agreement in force until mid-1997 ("CBA1") provided full health benefits to all employees who retired with 30 years' seniority. In early 1997, General Dynamics and UAW negotiated a new collective bargaining agreement ("CBA2"), which ended the practice of providing health benefits to all retirees effective July 1, 1997. Instead, CBA2 offered retiree health benefits only to those employees who were at least 50 years old as of July 1, 1997. App., *infra*, 3a.

Respondents are present and former employees of General Dynamics who were at least 40 but not yet 50 years old on July 1, 1997. *Id.* Respondents are therefore within the ADEA's protected class, which includes workers over 40. ADEA § 12(a), 29 U.S.C. § 631(a). Each of the respondents had qualified or could potentially have qualified for retiree health benefits under CBA1, but was ineligible for such benefits under CBA2. App., *infra*, 3a.

II. Proceedings In The District Court

Respondents filed a putative class action against General Dynamics in the United States District Court for the Northern District of Ohio. App., *infra*, 2a-3a, 21a. Respondents alleged that CBA2's limitation of retiree health benefits to employees over 50 amounted to age discrimination, and they sought damages under the ADEA and state law. *Id.* at 22a.

The district court granted General Dynamics' motion to dismiss. App., *infra*, 21a-25a. Because respondents' suit stemmed from the fact that they were too *young* to receive health benefits under CBA2, the district court observed that their ADEA claim was an assertion of "'reverse discrimination[,]' whereby older workers receive favorable treatment relative to younger workers." *Id.* at 23a. The court determined at the outset that respondents' complaint would stand

or fall based on whether reverse discrimination claims are cognizable under the ADEA. *Id.* at 23a-24a. Thus, the dispositive question before the court was whether the ADEA precluded General Dynamics from excluding respondents from the new retiree health insurance plan on the basis of their relative youth, in comparison to older employees who retained retiree health benefits under CBA2. *Id.* at 24a.

The district court held that reverse discrimination is not actionable under the ADEA. The court reasoned that the congressional purpose in enacting the ADEA was to "address the problems faced by *older* workers" by giving them a remedy for the discrimination they faced, not to prevent employers from affording those older employees more favorable treatment than other workers within the Act's over-40 protected class. App., *infra*, 24a. The district court also noted that "[e]very federal court to have addressed the issue has held that a claim of reverse age discrimination is not cognizable under ADEA." *Id.* Accordingly, the court dismissed respondents' complaint for failure to state a claim. *Id.*

III. Proceedings In The Court Of Appeals

Respondents appealed, and a divided panel of the Sixth Circuit reversed. App., *infra*, 1a-20a. Relying on what it termed the "plain" language of the statute, the court held that the only possible construction of the ADEA's operative provision, § 4(a)(1), bars basing employment decisions on chronological age in any way, insofar as those decisions affect workers older than 40. *Id.* at 6a-7a. The court of appeals accordingly refused to give weight to the congressional findings and declarations of policy contained in § 2 of the ADEA, which make clear that Congress intended to prohibit discrimination against "*older* workers." *See id.* at 8a-9a. The court acknowledged that its conclusion ran contrary to decisions of the First and Seventh Circuits, *id.* at 6a-7a (citing *Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988) (Breyer, J.); *Hamilton v. Caterpillar, Inc.*, 966 F.2d

1226, 1228 (7th Cir. 1992)), and "the majority of courts to consider the question." *Id.* Nonetheless, the court below opined that "we do not find the reasoning undergirding these opinions persuasive." *Id.* at 7a.

The court of appeals repeatedly stated that it was relying only on the "plain" language of § 4(a)(1), which it declared was controlling over any more general provision like the congressional findings and declarations set forth in § 2. The court also asserted, however, that its conclusion would be the same even if it looked to those provisions. App., *infra*, 8a-9a. Moreover, the court noted that the Equal Employment Opportunity Commission ("EEOC") had promulgated a regulation interpreting the ADEA to prohibit reverse discrimination against members of the protected class. *Id.* at 10a (citing 29 C.F.R. § 1625.2(a)). The court of appeals did not rely on that regulation as controlling authority, but stated that it found the EEOC's interpretation to be a "true rendering" of the ADEA's language. *Id.*

Judge Cole concurred, writing separately to note his discomfort with the "counterintuitive" result reached by the opinion he joined and his "serious doubts" that the majority's holding accorded with Congress's intent in enacting the ADEA. App., *infra*, 18a, 12a. Judge Cole also conceded that the majority's decision was in "implicit tension" with this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), which held that a prima facie case of age discrimination under the Act includes a showing that the challenged employer action favored a person "substantially younger" than the plaintiff. *Id.* at 16a-17a (citing *O'Connor*, 517 U.S. at 313). Judge Cole stated that although *O'Connor*'s adoption of a "substantially younger" test "suggests that reverse age discrimination claims are not permitted under the ADEA," he was confident that this Court would reformulate the test to require a "substantial difference in age" instead. *Id.* at 17a-18a.

Judge Williams dissented. App., *infra*, 18a-20a. Noting that the panel majority stood virtually alone in its construction of the Act to permit reverse discrimination suits, he stated that he would have followed the holding of the Seventh Circuit, in the leading case expounding the majority view, that "the ADEA does not protect the young against the old, or even, we think, the younger *against* the older." *Id.* at 18a-19a (quoting *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226, 1227 (7th Cir. 1992)) (citation omitted). He reasoned, as did the Seventh Circuit, that "age discrimination cannot be reversed as can sex or race discrimination because '[a]ge is not a distinction that arises at birth. Nor is age immutable.'" *Id.* at 19a (quoting *Hamilton*, 966 F.2d at 1227) (alteration in original). Although he thought there might be "room for argument" over the meaning of § 4(a)(1) considered in isolation, he stated that such ambiguity could and should be resolved by referring to the statement of findings and purpose in § 2 of the ADEA, 29 U.S.C. § 621. *Id.* That provision's repeated references to "older workers" and "older persons," he wrote, make clear "Congress's intent to prohibit employers from discriminating against older workers, as opposed to younger ones." *Id.*

Judge Williams also pointed out that the majority's decision threatened to upset the age-based benefit and early retirement programs that collective bargaining agreements across the country have established, in recognition of the fact that "a 50-year-old worker may need more protection or more benefits than a 40-year-old worker." *Id.* The inevitable result of the majority's contravention of this "common sense understanding" of benefits negotiation, he warned, would be that "bargaining for all workers, regardless of age, [will] suffer." *Id.*

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's holding that reverse discrimination is cognizable under the ADEA is squarely contrary to the deci-

sions of virtually every other court to consider the question, including the First and Seventh Circuits, and is in direct tension with this Court's precedents. Moreover, the decision below is clearly wrong, and works in polar opposition to Congress's purpose in adopting the ADEA. The Act was expressly intended to combat discrimination against "older workers" and to eradicate stereotypical views that disadvantage those employees who are relatively older than others in the workplace. The court of appeals' counterintuitive conclusion that the ADEA permits *younger* employees to challenge the beneficial treatment of *older* workers is nothing short of absurd, and runs directly counter to the clear meaning and intent of the ADEA.

The decision below poses a direct threat to employers' reasonable efforts to facilitate older workers' securing, retaining, or re-entering productive employment and to provide appropriate but cost-effective benefits packages responsive to the needs of older employees. In addition, the rule adopted by the court below threatens to make dramatically more burdensome the litigation of conventional age discrimination claims. The question presented is clearly one of recurring importance, and the Sixth Circuit's decision creates an intolerable dilemma for nationwide employers like petitioner, who are now obligated to conform their conduct to widely varying interpretations of the ADEA in different jurisdictions across the country. This Court should forestall these adverse consequences by granting certiorari to resolve the acknowledged circuit split created by the Sixth Circuit's deeply flawed construction of the ADEA.

I. Review Is Warranted Because The Lower Federal Courts Are Divided Over the Question Whether Reverse Discrimination Is Actionable Under The ADEA

The decision below creates a clear circuit split over the question whether the ADEA precludes the adoption of policies that favor older workers over younger workers. The

Sixth Circuit's holding is diametrically opposed to other decisions addressing the same issue on almost precisely the same facts. The decision below thus cannot be reconciled with the weight of authority holding that reverse discrimination is not actionable under the ADEA.

Indeed, as noted above, the Sixth Circuit correctly acknowledged that its holding was directly contrary to the Seventh Circuit's decision in *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992). The facts of that case are virtually identical to those presented here: In the course of labor negotiations, Caterpillar agreed that in the event of a plant closing, it would establish a retirement benefit program open only to workers at least 50 years of age with at least 10 years of service. When the program took effect, a class of 40- to 49-year-old employees with the requisite ten years' seniority brought suit under the ADEA. *Id.* at 1227.

The *Hamilton* court rejected the ADEA claim as proceeding from a faulty premise. Age discrimination, the court explained, is not a distinction that "cuts both ways," like race or sex discrimination; age is neither an inborn characteristic nor an immutable one. *Id.* Moreover, "[t]here is nothing to suggest that Congress believed age to be the equal of youth in the sense that the races and sexes are deemed to be equal." *Id.* To the contrary, "[i]f the Act were really meant to prevent reverse age discrimination, limiting the protected class to those 40 and above would make little sense." *Id.* This interpretation of the Act was further bolstered by Congress's findings and statement of legislative purpose in § 2 of the Act, which make clear that Congress intended to address "the problems faced by 'older workers' and 'older persons.'" *Id.* at 1228 (quoting 29 U.S.C. § 621(a)). As the Seventh Circuit explained, "There is no evidence in the legislative history that Congress had any concern for the plight of workers arbitrarily denied opportunities and benefits because they are too *young*." *Id.* Accordingly, the Seventh Circuit held that

"[t]he ADEA does not provide a remedy for reverse age discrimination." *Id.*

As the court below acknowledged, App., *infra*, 7a, its holding is also inconsistent with the First Circuit's decision in *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988) (Breyer, J.). In *Schuler*, the court considered an ADEA claim by a worker who claimed that he had been forced into retirement on account of his age. He based his claim in part on the company's development of a severance plan that his supervisor encouraged him to accept (and that he ultimately did accept). *Id.* at 277-78. In an opinion by then-Judge Breyer, the First Circuit held that Schuler could not make out a claim of age discrimination based on the terms of the severance plan. Although the plan "offered greater benefits to those with more seniority," the court held that the ADEA "does not forbid treating older persons *more* generously than others." *Id.* at 278 (emphasis in original).[1]

As these decisions demonstrate, the courts of appeals are now sharply divided over the question presented in this petition. The conflict extends beyond the circuit court level as well; the numerous decisions of district courts that have considered the question have reached divergent results, with the majority holding that reverse discrimination is not actionable under the ADEA.[2] This Court's review is necessary to re-

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[1] The Ninth Circuit has also noted its skepticism regarding the notion of a reverse age discrimination claim, without deciding the issue. *See Stone v. Travelers Corp.*, 58 F.3d 434, 437 (9th Cir. 1995).

[2] *Compare, e.g., Dittman v. Gen. Motors Corp.-Delco Chassis Div.*, 941 F. Supp. 284, 287 (D. Conn. 1996) (holding that reverse discrimination is not actionable under the ADEA), *aff'd on other grounds*, No. 96-9442, 1997 WL 340267 (2d Cir. June 20, 1997); *Parker v. Wakelin*, 882 F. Supp. 1131, 1140 (D. Me. 1995) (same), *aff'd in part and rev'd in part on other grounds*, 123 F.3d 1 (1st Cir. 1997); *and Wehrly v. Am. Motor Sales Corp.*, 678 F. Supp. 1366, 1381-82 (N.D. Ind. 1988) (same), *with Miss. Power & Light Co. v. Local Union Nos. 605 & 985, IBEW*, 945 F. Supp. 980, 985 (S.D. Miss.) (holding that reverse discrimination is actionable under the ADEA), *aff'd mem.*, 102 F.3d 551 (5th Cir. 1996).

solve the conflict and provide a clear rule to guide federal and state courts considering the viability of reverse discrimination claims by employees covered by the ADEA.

II. The Ruling Below Is Inconsistent With Decisions Of This Court

In addition to creating a conflict with numerous decisions of the lower federal courts, the Sixth Circuit's decision in this case is also at odds with this Court's precedents. For this reason as well, plenary review is warranted.

In his concurring opinion below (App., *infra*, 16a), Judge Cole forthrightly and correctly noted the "implicit tension" between the rule the panel majority adopted and this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). In *O'Connor*, this Court addressed the question whether an ADEA plaintiff's prima facie case must include proof that the employee who was preferred over the plaintiff was outside the protected age group altogether. The Court held that a plaintiff need not show that his or her replacement was younger than 40, *i.e.*, entirely outside the Act's protected class. Rather, it was sufficient for the plaintiff to establish that the replacement was "substantially younger than the plaintiff." *O'Connor*, 517 U.S. at 313. The Court premised its "substantially younger" test on the need for a "logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'" *Id.* at 311-12 (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*,

450 U.S. 248, 254 n.7 (1981)). Thus, this Court did not formulate the "substantially younger" requirement arbitrarily, but instead did so in light of the underlying discrimination that the Act forbids and for which the ADEA prima facie case is intended to serve as a proxy, *i.e.*, discrimination against *older* workers based on their relatively advanced years.

The decision below cannot be reconciled with the test adopted in *O'Connor*. If, as the *O'Connor* Court held, an ADEA plaintiff cannot even make out a prima facie case absent proof that the preferred employee was "substantially *younger*" than the plaintiff, it necessarily follows that the ADEA does not proscribe employer policies that favor *older* workers over those "substantially younger." Judge Cole's blithe assumption that this Court did not mean what it said in *O'Connor* is no substitute for adherence to binding precedent. The panel's failure to give effect to the clear import of *O'Connor* merits this Court's review.

The decision below also runs counter to the reasoning adopted by this Court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). In that case, this Court explained that Congress enacted the ADEA to eradicate the "inaccurate and stigmatizing stereotypes" that were causing "older workers" to be deprived of opportunities for employment, and that the "very essence of age discrimination" prohibited by the Act is "for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Id.* at 610. As the *Hazen Paper* Court took pains to reiterate, the ADEA encapsulates Congress's recognition that age discrimination, unlike other forms of disparate treatment such as race and sex discrimination, largely stems not from "animus" but from "stereotypes unsupported by objective fact" about the continued ability of "older workers." *Id.* at 610-11 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983)) (internal quotation marks omitted). Thus, the "prohibited stereotype[s]" that the ADEA seeks to eliminate are those that are adverse to "[o]lder employees." *Id.* at 612. Accordingly, when employers instead extend *more favorable* treatment to "older workers," the problem addressed by Congress in the ADEA is simply not present.

O'Connor and *Hazen Paper* both teach that the ADEA seeks to remedy a specific societal ill. Its primary aim is to eradicate outmoded stereotypes about older Americans' proper place in the workforce. The Sixth Circuit's wooden reading of the ADEA subverts the very purpose of the Act as explicated in this Court's opinions. Review is warranted to resolve this tension.

III. The Ruling Below Is Inconsistent With Congressional Purpose And Intent

The court of appeals' holding that the ADEA permits *younger* employees to challenge favorable treatment of *older* employees is impossible to reconcile with Congress's purpose in enacting the ADEA. As this Court's decisions in *Hazen Paper* and *O'Connor* indicate, analysis of the statute as an integrated whole makes clear that the ADEA focuses on remedying discrimination against *older* workers arbitrarily based on their age. Thus, the statement of purpose that Congress wrote into the ADEA makes clear that it was intended to *benefit* older workers in particular, not to deprive employers of the ability to favor older employees in ways not offered to younger employees. Further, the existence of the minimum age limitation on the protected class belies the notion that the Act is intended to protect younger employees against their senior coworkers. Finally, the legislative history and the backdrop against which Congress passed the Act eliminate any possible doubt on this score. Consideration of each of these sources compels the conclusion that the court of appeals misconstrued the statute and contravened the congressional purpose that underlies the ADEA.

The court below gave no weight to any of these indicia of congressional intent because it concluded that the statutory text was so "plain" as to admit of only one possible interpretation. To the contrary, however, the term "age" is susceptible of at least two plausible constructions when considered in isolation. To be sure, "age" could be understood to refer merely to the number of years lived to date. Considerably more plausible, however, is the definition of "age" as referring to the "state of being old." *E.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 40 (1976) (defining "age," inter alia, as "[a]n advanced stage of life," "the latter part of life," and "[t]he quality or state of being old"); *accord* AMERICAN HERITAGE COLLEGE DICTIONARY 25 (3d ed. 1993) (defining "age," inter alia, as "[t]he state of being old; old age"); *see also Hamilton*, 966 F.2d at 1227 (differentiating "age" and "youth").

Thus, viewed in isolation, the term "age" in § 4(a)(1) could perhaps be read in the manner adopted by the court below. But "statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803, 809 (1989). The court of appeals' counterintuitive construction derived from the court's insistence on beginning and ending with a single definition of an isolated term, without reference to parallel portions of the same statute or to the legislative purpose codified at the statute's outset. As this Court has cautioned, however, in many cases such a myopic methodology "would defeat the object which the Legislature intended to accomplish"; a court cannot "'look merely to a particular clause in which general words may be used'" but must instead "'take in connection with it the whole statute . . . and the objects and policy of the law . . . .'" *Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)).

In the case of the ADEA, the first logical referents in ascertaining the proper meaning of § 4(a)(1) are the legislative findings and declaration of purpose in § 2. Because these overarching provisions are "included in the [Act's] text," they are particularly useful tools to "give[] content" to the Act's other terms. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999); *accord Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002); *cf. United Air Lines, Inc. v. McMann*, 434 U.S. 192, 198 (1977) (noting the interrelationship between the ADEA's purposive and prescriptive provisions and stating that "the Act is the vehicle by which its purposes are expressed and carried out").

The congressional findings emphasize that the Act was intended to address the difficulty that age discrimination poses for "older workers" and "older persons," who faced disproportionately high rates of unemployment due to the persistence of discriminatory, age-based stereotypes about their competence. ADEA § 2(a)(1)-(3), 29 U.S.C. § 621(a)(1)-(3); *see Hazen Paper*, 507 U.S. at 610; *EEOC v. Wyoming*, 460 U.S. at 230-31. Congress found that those stereotypes led employers to set "arbitrary age limits," which "work *to the disadvantage of older persons*" who are seeking "to retain employment, and especially to regain employment when displaced from jobs." ADEA § 2(a)(1)-(2), 29 U.S.C. § 621(a)(1)-(2) (emphasis added); *see W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 410 (1985) ("[T]he policies and substantive provisions of the Act apply with especial force in the case of mandatory retirement provisions."). The result of these discriminatory practices was that long-term unemployment became, "*relative to the younger ages*, high among *older workers*." ADEA § 2(a)(3), 29 U.S.C. § 621(a)(3) (emphases added).

These findings, the product of extensive inquiry by Congress and, at its direction, by the Secretary of Labor, *see EEOC v. Wyoming*, 460 U.S. at 230-31 (detailing the genesis

and drafting of the Act), underscore the precision with which Congress focused on the disadvantages that *older* workers face "relative to the younger ages." The court of appeals' interpretation of the ADEA simply cannot be squared with these clear indications of congressional intent set forth in the text of the Act itself.

Significantly, moreover, Congress also declared that a primary purpose of the ADEA was "to help employers and workers find ways of meeting problems arising from *the impact of age on employment*." *Id.* § 2(b), 29 U.S.C. § 621(b) (emphasis added). The reference to "age" in this provision makes sense only if the term is defined, as discussed above, as synonymous with "advanced years" or "the state of being old"; it is not chronological age *per se*, but the problems often associated with relatively *advanced* years that would have an "impact . . . on employment" felt by both employers and employees. Congress's use of the term "age" in this sense here, at the outset of the Act, confirms that it used the term in the same sense in the Act's operative provision. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) ("[I]dentical words used in different parts of the same act are intended to have the same meaning." (quotation omitted)).

Congress's decision to set the lower bound of its protected class at 40 similarly refutes the notion that the Act forbids discrimination against younger individuals in favor of older workers. Workers enter the protected class at 40, which "testimony indicated . . . to be the age at which age discrimination in employment becomes evident." H.R. REP. No. 90-805, at 6 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2219. Even if Congress had discerned a pattern of employees' facing arbitrary classifications rooted in inaccurate stereotypes about youth rather than age, it could hardly have

understood such a pattern to become evident *only at age 40*. For Congress to have prohibited reverse discrimination against younger workers, but simultaneously to have denied that doctrine's protection to its most likely beneficiaries—those under 40—would be nothing short of absurd. Statutes ought not be construed in a manner that yields absurd results. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994); *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 200 (1993).[3]

Thus, considered in the statutory context in which Congress embedded it, the prohibition against discrimination "because of age" is susceptible of only one meaning—one that does not extend to discrimination against employees on account of their relative youth. The court of appeals' contrary determination improperly ignores the structure and context of the statute as a whole and violates fundamental canons of statutory construction adopted and repeatedly reaffirmed by this Court's decisions.

The legislative history of the ADEA serves only to bolster the majority view that "reverse discimination" is not actionable under the Act, and eliminates any possible doubt on this point. The President's message on the issue of age discrimination presaging his submission of a draft ADEA to Congress,[4] the comments of the Secretary of Labor on the

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[3] Indeed, some state courts have determined that their state age discrimination laws cover reverse discrimination by reasoning that, *unlike the ADEA*, the state laws' protected classes contain no lower limit, or set the threshold at 18. *See, e.g., Zanni v. Medaphis Physician Servs. Corp.*, 612 N.W.2d 845, 847 (Mich. Ct. App. 2000) (limited en banc); *Bergen Commercial Bank v. Sisler*, 723 A.2d 944, 950 (N.J. 1999); *Ogden v. Bureau of Labor*, 699 P.2d 189, 192 (Or. 1985) (in banc).

[4] *See* Special Message to the Congress Proposing Programs for Older Americans, 1 PUB. PAPERS 32, 37 (Jan. 23, 1967).

draft bill,[5] and the report of the committee that authored the bill that was ultimately enacted[6] all indicate that the ADEA was aimed at protecting *older* workers against employer practices and policies that favored *younger* workers—not the other way around.

The Sixth Circuit's rigid reading of a single provision of the Act threatens to produce precisely the opposite effect—to undermine the very protections and opportunities that Congress sought to secure. The court below pressed forward with this result, "whether specifically intended [by Congress] or not," App., *infra*, 12a (Cole, J., concurring), in the face of evidence from text, context, structure, and history that Congress can *only* have intended the term "age" to refer to the characteristic—relatively advanced years—shared by the "older workers" of the protected class.[7] Review is warranted

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[5] *Age Discrimination in Employment: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 90th Cong. 47 (1967) (responses of Willard Wirtz, Sec. of Labor) [hereinafter *Hearings*] (describing the Act as "an over-age employment discrimination measure" and opposing a reduction in the age of coverage to 21, which would "change the nature of the proposal").

[6] *See, e.g.*, H.R. REP. NO. 90-805 (1967), at 6 (stating that the committee declined to lower the age limit to an age below 40 because to do so "would lessen the primary objective; that is, the promotion of employment opportunities for older workers"), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2219; *see also id.* at 1 ("It is the purpose of H.R. 13054 to promote the employment of older workers based on their ability."), *reprinted in* 1967 U.S.C.C.A.N. at 2214.

[7] Thus, the EEOC regulation seemingly accepting the reverse-discrimination theory, 29 C.F.R. § 1625.2(a), can offer no support for the lower court's decision, because it is contrary to the text and structure of the Act and accordingly is due no deference by this Court. *See, e.g., Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989).

to ensure that this intent is not frustrated and that the true meaning of the Act is furthered.

IV. The Question Presented Is An Important And Recurring One, And The Burdensome Impact Of The Decision Below Necessitates This Court's Review.

The Sixth Circuit's decision poses a serious threat to a wide variety of employer programs and policies that work to the benefit of older American workers. Indeed, the rule announced by the decision below threatens to effect a dramatic shift in the conduct of ADEA litigation writ large. Review by this Court is necessary to eliminate the grave consequences produced by this decision.[8]

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[8] The reverse discrimination issue has already arisen in numerous federal courts from Maine to California. The question has already been presented at least to the court below, to the First and Seventh Circuits (which rejected it, as discussed above), and to the Ninth and Eleventh Circuits, which avoided resolving the issue by deciding their cases on narrower grounds. *Stone v. Travelers Corp.*, 58 F.3d 434, 437 (9th Cir. 1995); *Edwards v. Bd. of Regents of the Univ. of Ga.*, 2 F.3d 382, 383 (11th Cir. 1993). As noted above, moreover, numerous district courts have also adjudicated the issue and have likewise reached divergent results. *See* cases cited *supra* note 2; *Stone*, 58 F.3d at 437 (noting the district court's holding that the ADEA does not prohibit reverse discrimination); *Conn v. First Union Bank of Va.*, Civ. Action No. 94-0901-R, 1995 U.S. Dist. LEXIS 9242, at *2-*7 (W.D. Va. Mar. 17, 1995) (holding that the ADEA does not prohibit reverse discrimination); *see also Greer v. Pension Ben. Guar. Corp.*, No. 00 CIV 1272 SAS, 2001 WL 137330, at *5 (S.D.N.Y. Feb. 15, 2001) (rejecting reverse discrimination claim under the ADEA on narrower grounds).

First and foremost, interpreting the Act to allow suits for reverse discrimination threatens to invalidate threshold-age requirements for a variety of employee benefits. In times of economic uncertainty, employers are faced with the need to scale back previously generous benefits programs; in many cases, the choice they face is between offering a retirement or other benefit only to some employees, and offering it to none. Threshold age classifications are common and important components of this scaling-back process.[9]

More generally, construing the ADEA to authorize reverse discrimination claims threatens to infuse a new across-the-board rigidity into employment decisions and remove employers' license to accommodate older workers' special needs. Because the Act applies to all the incidents of the employment relationship, employers seeking to facilitate the congressional purpose of welcoming older workers into gainful employment and encouraging them to remain will be pre-

[9] To be sure, the ADEA provides affirmative defenses that might ultimately defeat liability in some such instances involving certain types of benefits programs. *See* ADEA § 4(f)(2), (*l*), 29 U.S.C. § 623(f)(2), (*l*). However, requiring employers to make out one of these fact-specific affirmative defenses in order to avoid liability for reverse discrimination would impose far greater uncertainty and litigation expense on employers, and there is no guarantee that such defenses would ultimately be successful in any, let alone all, such cases. *See, e.g.*, *Wehrly*, 678 F. Supp. at 1382-83 (referring to the "manifestly unreasonable" burden on employers that would be imposed by requiring them to make out affirmative defenses to a non-cognizable claim). The *in terrorem* effect of the Sixth Circuit's decision is thus unmitigated by the hypothetical availability of potential affirmative defenses in a limited category of cases. And as discussed *infra*, the disruption likely to be worked by the reverse-discrimination rule is not limited to the benefits context.

cluded from offering those older workers any preferential treatment or incentive. For example, law enforcement agencies that maintain rigorous physical fitness requirements will likely be precluded from relaxing those standards for older personnel to facilitate their retention. *See, e.g.*, *Koger v. Reno*, 98 F.3d 631, 634 (D.C. Cir. 1996) (describing the U.S. Marshals Service's use of a physical fitness component, with an age-based sliding scale, in promotion decisions). Thus, employers will face the same Hobson's choice as in the benefits context: Either extend the age-tailored preference to *all* employees—an option that will frequently be prohibitively expensive or, as in the physical fitness example discussed in *Koger*, simply unrealistic—or withdraw the preference altogether. Perversely, those most injured by this interpretation will be the very group of older workers whose employment opportunities Congress sought to *enhance* by adopting the ADEA.

Another significant consequence of the Sixth Circuit's reverse-discrimination rule is a substantial increase in the difficulty of defending *conventional* age discrimination suits. In many such cases, the defendant has most readily dispelled an inference of age discrimination by demonstrating that *older* workers were treated better than the plaintiff. This form of proof has been particularly important in disparate impact cases,[10] in which statistical evidence is frequently essential to the analysis, *e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988) (plurality opinion), and intent is largely irrelevant, *Griggs v. Duke Power Co.*, 401 U.S. 424,

[10] This Court has not yet resolved the circuit split over whether a plaintiff may maintain an ADEA claim on a theory of disparate impact. *Hazen Paper*, 507 U.S. at 609-10; *Adams v. Fla. Power Corp.*, 255 F.3d 1322, 1324-25 & n.5 (11th Cir.), *cert. granted*, 534 U.S. 1054 (2001), *cert. dismissed*, 122 S. Ct. 1290 (2002).

432 (1971). However, the ability to show that older workers were treated more favorably than their younger counterparts is important in disparate treatment cases as well. *See, e.g.*, *Skalka v. Fernald Envtl. Restoration Mgmt. Corp.*, 178 F.3d 414, 422 (6th Cir. 1999); *Koger*, 98 F.3d at 634 (noting such factors as the age-based sliding scale for physical fitness requirements as evidence that the Marshals Service acted to accommodate older deputy marshals, not to disfavor them). Yet under the Sixth Circuit's construction of the ADEA, this defense is no longer available to employers, because proof that older workers were favored simply establishes *another* ADEA violation rather than refuting the plaintiffs' initial claim.

Indeed, the union of the disparate impact and reverse discrimination theories in the ADEA will inexorably require employers to afford *absolute identity of treatment* to every worker over 40 in order to minimize the risk of ADEA liability. A number of cases permit ADEA plaintiffs to sue based on disparate impact on a *subset* of the Act's 40-and-over protected class,[11] even when the members of the protected class as a whole suffer no identifiable burden. Although this form of classifying by subset might make sense as a way of preventing discrimination directed against the very oldest workers, combining it with the reverse discrimination theory leaves it completely unbounded. Because age, unlike race or sex, does not confer membership in a discrete, readily ascertainable category, any workforce of any size contains a "virtually infinite number of age subgroups," *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999), and

[11] *E.g.*, *Finch v. Hercules Inc.*, 865 F. Supp. 1104, 1129-30 (D. Del. 1994), *aff'd mem.*, 124 F.3d 186 (3d Cir. 1997); *Graffam v. Scott Paper Co.*, 848 F. Supp. 1, 3-4 (D. Me. 1994), *aff'd on other grounds*, No. 95-1046, 1995 WL 414831, at *4 n.4 (1st Cir. July 14, 1995).

thus any employment practice that disproportionately impacts *some* identifiable cohort within the ADEA's protected class might now be actionable—if not on an age discrimination theory, then on a reverse discrimination theory. Employers will be forced to ensure at least rough proportionality across every age cohort over 40, lest they disproportionately disfavor one subgroup and thereby subject themselves to potential liability and litigation expense limited only by the ingenuity and resourcefulness of class action plaintiffs' lawyers.

Thus, the rule laid down by the Sixth Circuit's decision is fraught with unanticipated consequences that will adversely affect a wide range of employment decisions and reshape the conduct of even conventional age discrimination litigation. Review is warranted to forestall the burdensome effects unleashed by the Sixth Circuit's distortion of Congress's purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 16, 2003

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Dennis Cline, *et al.*, Plaintiffs-Appellants, v. General Dynamics Land Systems, Inc. Defendant-Appellee.	No. 00-3468

Appeal from the United States District Court
for the Northern District of Ohio at Toledo.
No. 99-07401—David A. Katz, District Judge

Argued: September 18, 2001
Decided and Filed: July 22, 2002

Before: RYAN and COLE, Circuit Judges; WILLIAMS, District Judge*

ARGUED: Mark W. Biggerman, REMINGER & REMINGER, Cleveland, Ohio, E. Bruce Hadden, HADDEN COMPANY, Columbus, Ohio, for Appellants. Craig C. Martin, JENNER & BLOCK, Chicago, Illinois, for Appellee. ON BRIEF: Mark W. Biggerman, REMINGER & REMINGER,

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* Hon. Glen M. Williams, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Cleveland, Ohio, E. Bruce Hadden, HADDEN COMPANY, Columbus, Ohio, for Appellants. Craig C. Martin, JENNER & BLOCK, Chicago, Illinois, for Appellee.

RYAN, J., delivered the opinion of the court. COLE, J. (pp. 12-17), delivered a separate concurring opinion. WILLIAMS, D.J. (pp. 18-19), delivered a separate dissenting opinion.

OPINION

RYAN, Circuit Judge. We must decide whether the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, which prohibits an employer from discriminating against any employee age 40 and over on the basis of age, provides a cause of action for employees within the protected class who claim that their employer discriminated against them on the basis of age because of the employer's more favorable treatment of older employees, also within the class. We hold that on the facts of this case the ADEA does provide the plaintiffs a cause of action, and that they have made out an actionable claim.

We rest our holding on familiar canons of statutory construction too elementary to require a citation, which direct courts to apply statutes consistent with their plain language; that is, by assigning to the words of the statute their primary and generally understood meaning. We conclude that in dismissing the plaintiffs' complaint, the district court opinion departs from this familiar maxim, and therefore, we reverse the district court's judgment and remand for further proceedings.

I.

Dennis Cline, as named representative for the putative class, and 195 other employees of General Dynamics Land Systems, Inc., brought suit against their employer after their

labor union, the United Auto Workers, and General Dynamics entered into a new collective bargaining agreement (CBA2). The agreement took effect July 1, 1997. Before that date, the parties had been bound by a collective bargaining agreement (CBA1) that obligated General Dynamics to provide full health benefits to retired workers who had accumulated 30 years of seniority. With one exception, the new agreement no longer required General Dynamics to provide full health benefits to retirees. That exception held that only employees 50 years of age or older on July 1, 1997, remained eligible to receive full health benefits upon retirement. As a result, the plaintiffs sought, and obtained, a determination from the Equal Employment Opportunity Commission that the CBA2 adversely affected General Dynamics employees who were between the ages of 40 and 49 on July 1, 1997.

Cline and his fellow employees then filed suit under the ADEA, 29 U.S.C. §§ 621-634, and the Ohio Civil Rights Act, Ohio Rev. Code § 4112.99. They alleged that the provision of health benefits solely to those over the age of 50 constituted illegal discrimination based on age. Each of the plaintiffs was between the ages of 40 and 49 on July 1, 1997, and thus a member of the ADEA's protected class. For purposes of the lawsuit, the plaintiffs self-divided into three groups. The so-called "Cline group" is composed of 183 current General Dynamics employees who are no longer eligible for full health benefits upon retirement. The "Babb group" consists of 10 employees who retired prior to July 1, 1997, in order to receive full health benefits. Finally, the "Diaz group" includes three employees who retired after July 1, 1997, and are ineligible for health benefits.

In addition to their age discrimination claims, the plaintiffs also sought "declaratory judgment," but in their complaint they made no reference to the Declaratory Judgment Act; they simply requested that the district court determine

whether the Cline group had standing to sue and whether their claims were ripe. If the court determined that the Cline group did not have either standing and/or ripe claims, the plaintiffs then requested that the district court determine when they would have standing and ripe claims.

Upon the defendant's motion, the district court dismissed the plaintiffs' suit pursuant to Fed. R. Civ. P. 12(b)(6). At the outset of its memorandum opinion, the district court noted that the ADEA and the Ohio Civil Rights Act would be interpreted together and receive identical legal analyses. The district court characterized the plaintiffs' argument as a claim that they were wrongfully denied existing job benefits on the basis of age. The court held that under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1002(1), (2)(A), General Dynamics's provision of health benefits upon retirement was part of a "welfare benefit plan," which the company was not obligated to provide. The court concluded that it would have been permissible to withhold retiree health benefits from all employees under the CBA2. While the district court admitted that the CBA2 "facially discriminates" by creating two classes of employees based solely on age, it ultimately concluded that the ADEA does not recognize claims for "reverse discrimination." The court reasoned that the ADEA was drafted to aid "older workers,' not those who suffer age discrimination because they are too young. The district court did not specifically address Cline's request for declaratory relief.

II.

We review *de novo* a district court's grant of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Lawrence v. Chancery Court of Tenn.*, 188 F.3d 687, 691 (6th Cir. 1999).

The starting point in determining how a statute is to be applied is the language of the statute itself. *Consumer Prod.*

Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); *United States v. Ospina*, 18 F.3d 1332, 1335 (6th Cir. 1994). This court has said that "[t]he primary rule of statutory construction is to ascertain and give effect to the legislative intent." *Hedgepeth v. Tenn.*, 215 F.3d 608, 616 (6th Cir. 2000). Legislative intent, however, is gleaned primarily from the statute's plain language, and where the statute's language is plain and unambiguous, there is no justification for resorting to legislative history to ascertain the lawmaker's intent—the words of the statute suffice. *In re Comshare, Inc. Sec. Litig.*, 183 F.3d 542, 549 (6th Cir. 1999). The Supreme Court has recognized that "statutory provisions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Moreover, if a court thinks statutory language does not reflect what the court believes the legislators "must have" intended, the court may not, under the guise of "statutory interpretation," rectify the problem by holding, in effect, that the legislators intended something other than what they declared. "'It is not the Court's role to address perceived inadequacies in [a statute].'" *In re Aberl*, 78 F.3d 241, 244 (6th Cir. 1996) (quoting *Wolf Creek Collieries v. Robinson*, 872 F.2d 1264, 1269 (6th Cir. 1989)) (alteration in original). Thus, courts must apply a statute as its language directs, not in accordance with a judicial supposition as to what the legislature might better have written. The application of these simple and settled canons easily determines the proper resolution of this case. Section 623(a)(1) of the ADEA reads:

> It shall be unlawful for an employer—
>
> > (1) to fail or refuse to hire or to discharge *any individual* or otherwise discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges

> of employment, because of such individual's age.

29 U.S.C. § 623(a)(1) (emphasis added). This language clearly and unambiguously forbids employers from defining the terms and benefits of "any individual['s]" employment based solely on his or her age. In § 631(a), Congress declared that "any individual" means those "individuals who are at least 40 years of age." 29 U.S.C. § 631(a). Thus, by the law's plain language, an employer may not discriminate against any worker age 40 or older on the basis of age. Those younger than 40 are not protected by the ADEA. *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996).

To reach the conclusion for which the defendant argues, and that was found persuasive by the district court, we would be required to hold that the plain language of § 623(a)(1) and § 631(a) does not mean what it says when it refers to "any individual," but means, instead, "older workers." Thus, only "older workers," meaning those individuals who are at least 40 years of age and, in addition, relatively older than any other group of employees with whom they are compared, are protected. This *interpretive* reading of the statute led the district court to conclude that the ADEA does not prohibit an employer from discriminating, on the basis of age, against "any individual" who is a member of the ADEA's protected class, but only prohibits discrimination against those in the protected class who are "older" than the favored employees. We think the plain meaning of the statute will not bear that reading.

In support of its holding, the district court cited to *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226, 1228 (7th Cir. 1992), for the proposition that the ADEA does not recognize claims of reverse age discrimination. We recognize that *Hamilton* and the majority of courts to consider the question before us have held that the ADEA does not pro-

vide a cause of action for "reverse discrimination." *See, e.g., Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988) (Breyer, J.); *Karlen v. City Colls. of Chicago*, 837 F.2d 314, 318 (7th Cir. 1988); *Dittman v. General Motors Corp.*, 941 F. Supp. 284, 287 (D. Conn. 1996), *aff'd on other grounds*, No. 96-9442, 1997 WL 340267 (2d Cir. June 20, 1997) (unpublished disposition); *Parker v. Wakelin*, 882 F. Supp. 1131, 1140 (D. Me. 1995); *but see Miss. Power & Light Co. v. Local Union Nos. 605 and 985, Int'l Bhd. of Elec. Workers*, 945 F. Supp. 980, 988 (S.D. Miss. 1996); *Rannels v. Hargrove*, 731 F. Supp. 1214, 1220-21 (E.D. Pa. 1990). For a variety of reasons, however, we do not find the reasoning undergirding these opinions persuasive.

We find that the *Hamilton* opinion fails to properly interpret the ADEA. First, it assigns far too much weight to the hortatory, generalized language of Congress's Statement of Findings and Purpose in the ADEA. Second, it ignores, indeed it reverses, the familiar rule that the more direct and specific language of a statute ordinarily trumps the more generalized. *Metro. Detroit Area Hosp. Servs., Inc. v. United States*, 634 F.2d 330, 334 (6th Cir. 1980).

Turning to the Statement of Findings and Purpose:

> (a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, *older workers* find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs[.]
>
> . . . .
>
> (b) It is therefore the purpose of this chapter to promote employment of *older persons* based on their ability rather than age; to prohibit arbitrary age discrimination in employ-

> ment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621(a)-(b) (emphasis added). Notably, neither § 621, nor any other section of the statute, provides a definition of "older workers" or "older persons." Nonetheless, because statutory language should be given its plain meaning absent evidence to the contrary, we agree that Congress intended to protect older workers. But to hold that the ADEA protects older workers from employers' age discrimination provides no answer to the question this litigation presents. The question here is whether any worker over the age of 40 ("any individual") may be discriminated against on the basis of age. To hold, as the ADEA requires us to hold, that employment age discrimination against *any* worker at least 40 years of age is prohibited, does nothing to defeat the congressional intent to protect "older workers" and "older persons."

To repeat: § 623(a)(1) and § 631(a), taken together, prohibit an employer from discriminating against "any individual" 40 years of age or older based on that person's age. "'When we can discern an unambiguous and plain meaning from the language of a statute, our task is at an end.'" *Henry Ford Health Sys. v. Shalala*, 233 F.3d 907, 910 (6th Cir. 2000) (quoting *Bartlik v. U.S. Dept of Labor*, 62 F.3d 163, 166 (6th Cir. 1995)).

Our holding does not change even if one concludes—and we do not—that the hortatory language of § 621 is inconsistent with the plain meaning of § 623(a)(1) and § 631(a). When two different parts of a statute appear to conflict, the court should, if possible, give these parts a "harmonious, comprehensive meaning." *United States v. Stauffer Chem. Co.*, 684 F.2d 1174, 1184 (6th Cir. 1982), *aff'd*, 464 U.S. 165 (1984). The exhortation in § 621 to protect "older workers" and "older persons" is easily reconciled with the specific provisions of § 623 and § 631, which prohibit age discrimination against "any individual" age 40 or older. Courts must interpret statutes "'as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.'" *Cafarelli v. Yancy*, 226 F.3d 492, 499 (6th Cir. 2000) (citation omitted). In § 621, Congress declared its intention to protect older workers, and in § 623 and § 631, it identified the older workers it intends to protect as "any individual" age 40 or older. Thus, the several relevant sections of the statute are easily reconciled.

Moreover, we do not share the commonly held belief that this situation is one of so-called "reverse discrimination." Insofar as we are able to determine, the expression "reverse discrimination" has no ascertainable meaning in the law. An action is either discriminatory or it is not discriminatory, and some discriminatory actions are prohibited by law. Presumably, what the district judge and others mean when they conclude that the ADEA does not prohibit "reverse discrimination" is that otherwise prohibited discrimination is permitted if the victims are literally (statutorily) within the protected class, but are a group within the class who in most cases are the beneficiaries of discrimination against others. There is no basis for this conclusion. We are not aware of any legal doctrine permitting courts to redraft anti-discrimination statutes so that they better advance the court's view of sound policy. Furthermore, even if we granted the district court its definition of "reverse discrimination," it is clear that Cline and his classmates did not suffer "reverse age discrimination." By the plain language of the ADEA they are the victims of "age discrimination." Congress has singled out the over-40 class of workers from the general workforce for protection from age discrimination by their employers. All the plaintiffs are members of the protected class created by § 631(a), and all properly allege that they were denied job benefits due to their age. Therefore, the protected class

should be protected; to hold otherwise is discrimination, plain and simple.

Finally, we note that those courts adopting the *Hamilton* holding do so in contravention of the EEOC. The EEOC's interpretation of the ADEA "is significant because an agency's interpretation of an ambiguous provision within the statute it is authorized to implement is entitled to judicial deference." *Burzynski v. Cohen*, 264 F.3d 611, 619 (6th Cir. 2001) (internal quotation marks, citation, and alterations omitted). In its review of the matter at hand, the agency notes:

> *It is unlawful . . . for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over*. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.

29 C.F.R. § 1625.2(a) (emphasis added). While a court can certainly interpret a statute and properly reach a different conclusion from a federal agency, we are persuaded that the EEOC's interpretation of the ADEA is a true rendering of the language.

III.

There is no doubt that the facts of this case are unusual and fall outside the typical ADEA claim, in that the plaintiffs were younger than the employees who were to receive health benefits upon retirement under the CBA2. But the fact that some members within the protected class were beneficiaries of the discriminatory action of which other members of the protected class—the plaintiffs—were victims, does not somehow suspend the language of the statute,

which prohibits age discrimination against "any individual" within the protected class. As we stated earlier, when the language of a statute is unambiguous we have no basis for seeking a statute's meaning in its legislative history or intent. *In re Comshare, Inc. Sec. Litig.*, 183 F.3d at 549. The syllogism goes like this: The ADEA expressly prohibits denying any employee within the protected class an employment benefit solely because of age. The CBA2 provision in question denies a group of employees within the protected class an employee benefit based solely on their age. Therefore, the ADEA prohibits the CBA2 provision in question.

If Congress wanted to limit the ADEA to protect only those workers who are *relatively* older, it clearly had the power and acuity to do so. It did not. Whatever the policy justifications for holding otherwise, we are bound by the plain language of the statute and have no occasion to look outside of the text.

IV.

We express no opinion whether the plaintiffs have made out an actionable claim under the Ohio Civil Rights Act because we think the district court should be given the opportunity to consider that question in light of what we have decided today with respect to the ADEA.

V.

Because Cline and the other plaintiffs were each within the ADEA's protected class when their employer allegedly discriminated against them on the basis of age, we REVERSE the district court's grant of the motion to dismiss. On remand, the district court should address the plaintiffs' declaratory judgment argument concerning standing and ripeness, which was not considered by the district court and thus is not properly before us for review.

CONCURRENCE

R. GUY COLE, JR., Circuit Judge, concurring. I write separately to briefly set forth my thinking on this interesting question of law. While I join Judge Ryan's opinion based on the force of the plain language of the ADEA, I also entertain serious doubts as to whether Congress specifically intended that the ADEA allow persons ages forty and over to recover for so-called reverse age discrimination. Ultimately, from the text and structure of the ADEA, I conclude that in enacting the ADEA, Congress was most concerned with prohibiting age discrimination that favors younger over older employees, but that Congress's choice of language, whether specifically intended or not, also prohibits age discrimination that favors older over younger protected employees. With that perspective in mind, I emphasize three points: (1) sections 623 and 631 of Chapter 29 of the United States Code have clear meaning—they prohibit any form of age discrimination against persons ages forty and over; (2) no legally acceptable reason exists for looking beyond the language of the statute here; and (3) allowing reverse age discrimination suits is reconcilable with the "substantially younger" requirement announced in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996).

First, the text of the ADEA compels the conclusion that members in the protected class can sue for age discrimination that favors older over younger workers. Section 623 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Section 631 limits that age discrimination prohibition to "individuals who are at least 40 years of age." 29 U.S.C. § 631(a). Thus, taken together, §§ 623 and 631 unambiguously prohibit using age as a basis for employment decisions involving persons ages forty and over.

Second, this Court is bound to apply the plain language of the ADEA here. The law of the Circuit is well-established; in its efforts to interpret a statute, a court may look beyond the text only in four limited instances: (1) where the text is ambiguous; (2) where a literal reading is inconsistent with other statutory provisions; (3) where a plain-language reading is inconsistent with congressional intent; (4) where the plain statutory meaning leads to absurd results. *See Vergos v. Gregg's Enters., Inc.*, 159 F.3d 989, 990 (6th Cir. 1998); *Appleton v. First Nat'l Bank of Ohio*, 62 F.3d 791, 801 (6th Cir. 1995); *see also Limited, Inc. v. Comm'r of Internal Revenue*, 286 F.3d 324, 332 (6th Cir. 2002) ("Resort to legislative history is not appropriate, however, if the text of the statute may be read unambiguously and reasonably."). Not one of those limited situations is present here. And, for that reason, there is no basis for looking beyond the plain statutory language.

As discussed above, the texts of §§ 623 and 631 are not ambiguous. Rather, they suggest an unequivocal result—age discrimination in employment is generally unlawful and persons ages forty and over may sue an employer for such discrimination. Therefore, there is no ambiguity-based reason to look beyond the plain text of §§ 623 and 631.

Also, a literal reading of §§ 623 and 631 is not inconsistent with other statutory provisions. The Seventh Circuit in *Hamilton v. Caterpillar Inc.*, 966 F.2d 1226 (7th Cir. 1992), concluded that § 621(a)'s reference to "older workers" suggests that the ADEA's age discrimination prohibition applies only to workers who are older *vis-a-vis* preferably treated workers. *Id.* at 1228. But, § 621(a)'s use of the phrase "older workers" is at most ambiguous because "older workers" could also refer to that population of workers ages forty

and over. Thus, at worst, there still is no definite inconsistency between our interpretation of §§ 623 and 631 and the language of § 621(a). However, in contrast to the Seventh Circuit's holding, our reading of §§ 623 and 631 does not render § 623(*l*)(1)(A) meaningless. Section 623(*l*)(1)(A) allows an employer to set a minimum age as a condition for eligibility in a pension plan. 29 U.S.C. § 623(*l*)(1)(A). If younger protected employees could not sue their employers for the preferable pension treatment of older employees, then the minimum age exception in § 623(*l*)(1)(A) would not be necessary (because only younger employees could sue based on a minimum retirement age). In sum, because our reading of §§ 623 and 631 is not manifestly inconsistent with § 621 (a) and because § 623(*l*)(1)(A) has significance only if §§ 623 and 631 permit reverse age discrimination suits, there is no statutory conflict to justify looking beyond the text of the statutes.

In addition, this Court should not look beyond the statutory text because interpreting §§ 623 and 631 as allowing reverse age discrimination suits is consistent with Congress's statutorily stated intent for enacting the ADEA. *See* 29 U.S.C. § 621(b). In § 621(b), Congress declared that the purposes of the ADEA were "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.* Allowing younger employees to sue older employees for age discrimination is consistent with those purposes. For example, when a forty-two-year-old employee loses her job or benefits in favor of a fifty-two year-old employee due to her age, that termination is not based on her ability. Moreover, that loss of job or benefits furthers, instead of prohibits, arbitrary age discrimination in employment. Finally, permitting that type of age discrimination to continue without a remedy hardly amounts to a solution to the problems arising out of

the impact of age on employment. In short, because a plain language reading of §§ 623 and 631 is consistent with the ADEA's purpose, there is no conflict between the specific intent of Congress and the statutory text to justify considering sources beyond the statutes themselves.

Finally, this Court is confined to reviewing only statutory text because allowing reverse discrimination suits by persons in the protected class is not absurd as either a matter of reason or of policy. Allowing persons in the protected class to sue for reverse discrimination is a reasonable means of redressing two of the findings that prompted Congress to enact the ADEA. *See generally* 29 U.S.C. § 621. Congress declared in § 621(a)(1) that "in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs." 29 U.S.C. § 621(a)(1). Permitting younger members of the protected class to sue employers for age discrimination in favor of older workers is consistent with that finding. For example, a fifty year-old employee is equally disadvantaged in retaining and regaining employment if he is age discriminated against in favor of a thirty year-old as if he is age discriminated against in favor of a sixty year-old. In another of its findings, Congress declared that "the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce." 29 U.S.C. § 621(a)(4). Thus, Congress concluded that all age discrimination burdens commerce. Consequently, even the so-called reverse discrimination suits would alleviate the congressionally identified burden on commerce.

Likewise, as a matter of policy, allowing reverse age discrimination suits is not absurd. Such an interpretation hardly "open[s] the floodgates to attacks on every retirement plan," as the Seventh Circuit feared. *Hamilton*, 966 F.2d at 1228. Rather, courts have already begun to interpret

state discrimination laws as allowing reverse age discrimination suits. *See, e.g.*, *Bergen Commercial Bank v. Sisler*, 723 A.2d 944, 957 (N.J. 1999) (7-0 decision) (concluding that New Jersey's Law Against Discrimination was "broad enough to accommodate [plaintiffs] claim of age discrimination based on youth"); *Ogden v. Bureau of Labor*, 699 P.2d 189, 192 (Or. 1985) (en banc) (interpreting Oregon age discrimination law as allowing claims by younger workers); *Zanni v. Medaphis Physician Servs. Corp.*, 612 N.W.2d 845, 847 (Mich. Ct. App.) (holding that the Michigan Civil Rights Act "protects workers who are discriminated against on the basis of youth"), *appeal denied*, 618 N.W.2d 596 (Mich. 2000); *see also Graffam v. Scott Paper Co.*, 870 F. Supp. 389, 405 n.27 (D. Me. 1994) (noting that the Maine Human Rights Act does not limit age discrimination claims to a certain range of ages). Thus, based on the congressional statements of purpose and similar state-law provisions, it is not absurd to allow members of the protected class to sue for reverse discrimination.

The third reason for my separate concurrence is to reconcile the implicit tension between our conclusion today and the Supreme Court's holding in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). In *Consolidated Coin,* the Supreme Court considered whether to satisfy the *prima facie* test for indirectly proving age discrimination, an ADEA plaintiff had to be replaced by a person outside the protected class. *Id.* at 312. More concretely, the Court had before it the issue of whether a fifty-six year-old employee who was replaced by a forty year-old satisfied the fourth element of the *prima facie* test even though both employees belonged to the protected class. *Id.* The Court's analysis hinged on the logical connection between the elements of the *prima facie* test and illegal age discrimination. *Id.* at 311-12. After looking first at the text of the ADEA, the Supreme Court concluded that the fourth element of the *prima facie* test should include a "substantially younger" requirement instead of a "membership in the protected class" requirement. *Id.* at 313. Thus, *Consolidated Coin* instructs that to indirectly prove age discrimination, an ADEA plaintiff must demonstrate age discrimination that favors a substantially younger person.

Although this is a direct evidence age discrimination case and consequently does not rely on the *prima facie* test, the impact of the substantially younger requirement is significant. The substantially younger requirement implies that reverse age discrimination claims are not permitted under the ADEA because when discriminated against in favor of older workers, younger protected workers cannot prove that substantially younger persons were favored. As a result, those younger workers could not satisfy the substantially younger requirement, and thus could not state a *prima facie* claim under the ADEA. In short, *Consolidated Coin*, by limiting the *prima facie* test to persons injured by discrimination that favors someone substantially younger, suggests that reverse age discrimination claims are not permitted under the ADEA.

Despite that implication, three reasons give me confidence that the Supreme Court would approve of our result today. First, the Supreme Court was not considering reverse age discrimination in *Consolidated Coin.* Second, the *Consolidated Coin* holding acknowledged that members within the protected class may sue one another. Third, we follow the same recipe as the Supreme Court did—we look to the plain text of §§ 623(a)(1) and 631(a) to determine whether so-called reverse age discrimination is actionable under the ADEA. Based upon the combined effect of these three reasons, I do not believe that Supreme Court precedent dictates a result different than what we reach today. Moreover, had the Supreme Court also considered the question of reverse age discrimination in *Consolidated Coin*, I believe it would have expressed the fourth part of the *prima facie* test as requiring proof of "substantial difference in age" as op-

posed to "substantially younger." And, notably, based on our holding, the fourth prong of the *prima facie* test in this Circuit requires proof of substantial difference in age, not necessarily substantially younger proof.

In short, the result we reach today strikes me as counter-intuitive. But, the clarity with which Congress spoke convinces me that the ADEA permits younger workers in the protected class to sue their employers for age discrimination that favors older employees. Also, although a close call, I do not believe that our result violates Supreme Court precedent. For those reasons, I agree to reverse the district court's dismissal of plaintiffs' ADEA claims.

DISSENT

GLEN M. WILLIAMS, District Judge, dissenting. Whether you call it "reverse discrimination" or not, no court in the nation has recognized a claim for age discrimination under the ADEA when brought by younger workers within the protected class arguing that they were discriminated against in favor of older workers. As the majority recognizes above, the ADEA was developed by Congress for the purpose of alleviating problems faced by older workers, not the problems of younger ones. In this case, workers who were between 40 years of age and 50 years of age have brought this action claiming that, because they are a part of the protected class—all people older than 40—they are entitled to protection under the ADEA not only from workers who are younger than they are, but also from workers who are older than they are.

I am persuaded by the Seventh Circuit's reasoning in *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992), that such a claim is not cognizable under the ADEA. As the court in *Hamilton* explained, "the ADEA 'does not protect

the young as well as the old, or even, we think, the younger *against* the older.'" *Id.* at 1227 (quoting *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir. 1988)). The court reasoned that age discrimination cannot be reversed as can sex or race discrimination because "[a]ge is not a distinction that arises at birth. Nor is age immutable." *Id.*

Furthermore, while the statutory language of the ADEA may leave room for argument that reverse age discrimination is cognizable, I concur with the *Hamilton* court in that Section 621 of the ADEA refers to "older workers" and "older persons." *See* 29 U.S.C. § 621. These references are, therefore, telling of Congress's intent to prohibit employers from discriminating against older workers, as opposed to younger ones.

Finally, this dissent is based on a common sense understanding of collective bargaining agreements. I am of the opinion that the ADEA was not intended to interfere with the collective bargaining process or with collective bargaining agreements. The courts should not stand watch over labor unions who represent employees of a company and interfere with their negotiations with employers. I believe that it is obvious that the older a person is, the greater his or her needs become. Therefore, a 50-year-old worker may need more protection or more benefits than a 40-year-old worker. The majority's holding in this case potentially could have a devastating effect on the collective bargaining process, calling into question the validity of seniority and early retirement programs contained in collective bargaining agreements across the country. If such is allowed, bargaining for all workers, regardless of age, would suffer.

For the foregoing reasons, I would affirm the district court's decision to grant the Appellee's motion to dismiss based upon the determination that the Appellants did not allege facts to support a claim for discrimination under the

ADEA. Therefore, I respectfully dissent from the majority's opinion.

I do concur in the majority's decision not to consider whether the plaintiffs have made out an actionable claim under the Ohio Civil Rights Act because the district court should be given the opportunity to address this issue on remand.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Dennis Cline, *et al.*, Plaintiff, vs. General Dynamics Land Systems, Inc. Defendant.	Case No. 3:99 CV 7401 **MEMORANDUM OPINION**

KATZ, J. [Issued March 10, 2000]

This matter is before the Court on Defendant's motion to dismiss. For the following reasons, Defendant's motion will be granted.

BACKGROUND

The 196 named plaintiffs to this action are present or former employees of Defendant General Dynamics Land Systems, Inc. ("the Company") who were between forty and fifty years of age on July 1, 1997. At all times relevant to this dispute, the employment relationship was governed by a collective bargaining agreement ("CBA") between Plaintiffs and the Company.

The CBA that was in effect prior to July 1, 1997 ("CBA1") provided for continued health insurance benefits for retirees. The Company and Plaintiffs' union renegotiated that provision when CBAl ended. The renegotiated provision, which was included in the new CBA ("CBA2"), pro-

vided that continued retiree health insurance benefits would be provided only for employees who were at least fifty years of age on July 1, 1997, the effective date of CBA2.

Plaintiffs claim that CBA2 violates their rights by discriminating against them on the basis of their age. There are three subcategories of plaintiffs: (1) the "Cline group" consists of 183 current employees who were eligible for retiree health insurance benefits under CBA1, but not under CBA2; (2) the "Babb group" consists of ten employees who retired prior to July 1, 1997 in order to preserve their benefits under CBA1; and (3) the "Diaz group" consists of three employees who retired after July 1, 1997 and did not receive the continued health insurance benefits to which they would have been entitled under CBA1. Plaintiffs bring this action under the Age Discrimination in Employment Act, 29 U.S.C. §§ 623 *et seq.*, and analogous state law. They seek declaratory and injunctive relief, damages, and costs and fees.

Defendant has filed a motion to dismiss Plaintiffs' claims. It argues that age discrimination in favor of employees over the age of fifty does not violate applicable federal and state antidiscrimination law. Plaintiffs have responded to Defendant's motion, Defendant has replied, and Plaintiffs have filed a surreply. The Court discusses the parties' contentions below.

DISCUSSION

A. Motions to Dismiss

In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b), the function of the Court is to test the legal sufficiency of the complaint. In scrutinizing the complaint, the Court is required to accept the allegations stated in the complaint as true, *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984), while viewing the complaint in a light most favorable to the plaintiffs, *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683,

1686, 40 L. Ed. 2d 90 (1974); *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976). The Court is without authority to dismiss the claims unless it can be demonstrated beyond a doubt that the plaintiff can prove no set of facts that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957); *Westlake*, *supra*, at 858. *See generally* 2 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE, § 12.34[1] (3d ed. 1997).

B. Age Discrimination

Plaintiffs claim that their employer illegally discriminated against them on the basis of their age. The Age Discrimination in Employment Act generally prohibits employers from discriminating against employees on the basis of age. 29 U.S.C. § 623(a).[1] In this case, the CBA facially discriminates on the basis of age by creating two classes of employees: employees over the age of fifty, who are entitled to retiree health care benefits, and employees under the age of fifty, who are not. The sole issue before the Court on Defendant's motion to dismiss is whether the ADEA permits this sort of "reverse discrimination" whereby older workers receive favorable treatment relative to younger workers.

Plaintiffs have argued at length that they have not alleged reverse discrimination on the basis of age, and that reverse discrimination is not the issue before the Court. They say their claim is that they were wrongfully denied existing job

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[1] The Ohio Civil Rights Act provides the same. Ohio Rev. Code § 4112.02(A). For convenience, the Court will analyze Plaintiffs' federal and state law claims together, since the legal tests are the same under both statutes. *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n*, 66 Ohio St. 2d 192, 196, 421 N.E.2d 128, 131 (1981).

benefits to which they had previously been entitled, and that such denial was based on their age.

That argument lacks merit. The Employee Retirement Insurance Security Act ("ERISA") divides employee benefit plans into two types: pension plans and welfare benefit plans. 29 U.S.C. § 1002(1), (2)(A). A retiree health insurance benefits plan is a welfare benefit plan, which is not subject to statutory vesting requirements. Thus, it would have been permissible under ERISA for Plaintiffs' union and the Company to agree to abrogate the retiree health insurance benefits program for all current employees in CBA2. The fact that the benefits were available under CBA1 is not relevant to a determination of whether entitling only employees over the age of fifty to retiree health care benefits violates ADEA. The sole issue before this Court is whether an employer may legally provide a benefit to workers over the age of fifty, while denying that same benefit to workers below the age of fifty.

Every federal court to have addressed the issue has held that a claim of reverse age discrimination is not cognizable under ADEA. *E.g.*, *Hamilton v. Caterpillar Inc.*, 966 F.2d 1226, 227-28 (7th Cir. 1992); *Dittman v. General Motors Corp.*, 941 F. Supp. 284, 287 (D. Conn. 1996); *Parker v. Wakelin*, 882 F. Supp. 1131, 1140-41 (D. Me. 1995). Plaintiffs have cited to no case that permitted an employee to bring a claim of reverse discrimination under the ADEA, and this Court is aware of none. This is because Congress' purpose in enacting ADEA was to address the problems faced by *older* workers, not workers who suffer discrimination because they are too young. *Hamilton*, 966 F.2d at 228. Accordingly, the Court finds that Plaintiffs have not alleged any facts upon which they can prevail on their age discrimination claim

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is granted.

IT IS SO ORDERED.

/s/
DAVID A. KATZ
U.S. DISTRICT JUDGE

APPENDIX C

00-3468
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[FILED September 19, 2002
Leonard Green, Clerk]

DENNIS CLINE, *et al.*,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	ORDER
	)	
GENERAL DYNAMICS LAND SYSTEMS, INC.,	)	
	)	
	)	
Defendant-Appellee.	)	
	)	

BEFORE: RYAN and COLE, Circuit Judges; and WILLIAMS*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

* Hon. Glen M. Williams, Senior United States District Judge for the Western District of Virginia, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Williams would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk